

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WISCONSIN

APPLETON PAPERS INC. and  
NCR CORPORATION,

Plaintiffs,

**No. 2:08-cv-00016-WCG**

v.

GEORGE A. WHITING PAPER  
COMPANY, P.H. GLATFELTER  
COMPANY, and MENASHA  
CORPORATION,

**DEFENDANT MENASHA  
CORPORATION'S MOTION TO  
DISMISS**

Defendants.

**MOTION TO DISMISS**

Pursuant to Fed. R. Civ. P. 12(b)(1) and (6), Defendant Menasha Corporation respectfully moves this Court to dismiss Counts I and III of Plaintiffs' Second Amended Complaint.

Plaintiffs' First Count must be dismissed because the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") does not permit Plaintiffs such as NCR and API to assert a claim under both Section 107 and Section 113 (42 U.S.C. § 9607 and 42 U.S.C. § 9613, respectively). Here, Plaintiffs are entitled to relief, if at all, only under Section 113 of CERCLA because their own allegations and matters of public record referred to in their Second Amended Complaint demonstrate they incurred costs involuntarily, only after state and federal agencies stepped in to address pollution in the Lower Fox River. The Court should therefore dismiss their Section 107 claim. In addition, Plaintiffs lack standing to seek natural resource damages under Section 107(a)(4)(C) because only the government may recover such damages.

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The Court should also dismiss Plaintiffs' Third Count for two reasons: the express language of CERCLA does not authorize declaratory judgments in Section 113 actions, and this Court cannot fully and accurately allocate shares for the entire future cleanup of the Fox River at this time.

A more detailed statement setting forth the grounds for this Motion is set forth in Defendant Menasha Corporation's Memorandum in Support of its Motion to Dismiss, which has been filed and served concurrently with the foregoing Motion in accordance with the Local Rules.

Dated: March 24, 2008

s/ Mark R. Feldmann

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Attorneys for Defendant Menasha Corporation

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\* Request for Admission in the Eastern District of Wisconsin pending.

